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### Constitutional Law--Validity of Congressional Limitations on the President's Power of Removal (Rathbun v. United States, 55 S. Ct. 869 (1935))

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CONSTITUTIONAL LAW—VALIDITY OF CONGRESSIONAL LIMITATIONS ON THE PRESIDENT'S POWER OF REMOVAL.—Upon his refusal to resign after an exchange of correspondence in which President Roosevelt requested his resignation and gave as his reason therefor their divergent views on the policies and administration of the Federal Trade Commission, W. E. Humphrey was summarily removed by the President from his office as a member of that body on October 7, 1933, before the expiration of his term. Humphrey, however, insisted he was a member of the Commission entitled to perform his duties and receive the compensation provided by law, and on his death in February, 1934, his executor brought this action in the Court of Claims to recover for his estate the salary allegedly due the deceased from October 8, 1933 to February, 1934. Upon certification by the Court of Claims of two questions involving the President's power to order the removal, *held*, for the plaintiff. The Act creating the Federal Trade Commission provided that any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.<sup>1</sup> Since the work required of the Commission is in part quasi-judicial, quasi-legislative, the President had no power to remove for alleged incompatibility of a commissioner's views with those of the President on social and political problems in reference to the work of the Commission, as he might have if the commissioner were purely an executive officer. *Rathbun v. United States*, — U. S. —, 55 Sup. Ct. 869 (1935).

The removal power of the President has long been a contentious subject in American politics; its nature always remained uncertain while the courts tried to strike a balance between the alternate dangers of legislative interference with the executive and of executive irresponsibility in exercising an unchecked power of removal. In two previous cases the courts intimated that Congress could, by the use of clear and explicit language, limit the power of removal by prescribing a definite tenure, and providing for removal for no other causes than those enumerated in the statute.<sup>2</sup> In the instant case the Court gleaned this intention of Congress from the language of the Act,<sup>3</sup> the character of the Commission<sup>4</sup> and the debates in Congress

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<sup>1</sup> 38 STAT. 717 (1914), 15 U. S. C. A. §41 (1926).

<sup>2</sup> *United States v. Perkins*, 116 U. S. 483, 6 Sup. Ct. 449 (1886); *Shurtleff v. United States*, 189 U. S. 311, 23 Sup. Ct. 535 (1903).

<sup>3</sup> *Supra* note 1. Although the term of office is fixed and the causes for which a commissioner may be removed are enumerated, we note that the Court has held that the specification of a definite term was not equivalent to a positive inhibition of removal by Congress before its expiration. *Parsons v. United States*, 167 U. S. 324, 17 Sup. Ct. 880 (1896); *Burnap v. United States*, 252 U. S. 512, 40 Sup. Ct. 374 (1920); in *Shurtleff v. United States*, 189 U. S. 311, 23 Sup. Ct. 535 (1903) the Court refused to apply the usual rule of construction that the affirmative language of the statute (similar to the one under discussion) implied the negative of the power to remove except for causes after a hearing; the facts of that case, however, were different.

<sup>4</sup> *Sears, Roebuck v. Federal Trade Commission*, 258 Fed. 307 (C. C. A. 7th, 1919). It was to be non-partisan and from the very nature of its duties

concerning the general purposes of the Act.<sup>5</sup> But the Court still had to hurdle the logic of the Myers decision<sup>6</sup> which rendered all executive and administrative offices of the United States removable by the President at will. It did so by holding the *Myers* case controlling only as to "purely executive officers," thus setting up the character of the office as the basis for its judgment, and deciding, after a brief discussion of the nature of the Commission's duties and personnel, and the coequality of the departments of our government with the attendant doctrine of separation of powers, that it did not include the members of the Commission involved, who, when exercising any executive functions, as distinguished from executive powers in the constitutional sense, did so in discharge and effectuation of their quasi-legislative<sup>7</sup> and quasi-judicial<sup>8</sup> powers as agents of the legislative and judicial departments of the government. But the Federal Trade Commission is an administrative body exercising primarily administrative functions,<sup>9</sup> quasi-judicial in form only,<sup>10</sup> and only secondarily a legislative agency.<sup>11</sup> Nor does recourse to the doctrine

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was to act impartially and enforce no policy except the policy of the law. 38 STAT. 719, 721, 722 (1914), 15 U. S. C. A. §§45, 46, 47 (1926).

<sup>5</sup> SEN. REP. No. 597, 63d Cong., 2d Sess. at 10-11. The courts in construing a statute may consult the reports of the committee having it in charge. *McLean v. United States*, 226 U. S. 374, 33 Sup. Ct. 122 (1912); *Federal Trade Commission v. Raladam*, 283 U. S. 643, 51 Sup. Ct. 587 (1931).

<sup>6</sup> *Myers v. United States*, 272 U. S. 52, 47 Sup. Ct. 21 (1926). The opinion of the Court met with vigorous dissent from three of its members and was widely discussed and criticized at the time.

<sup>7</sup> 38 STAT. 721 (1914), 15 U. S. C. A. §46 (1926).

<sup>8</sup> 38 STAT. 722 (1914), 15 U. S. C. A. §247 (1926).

<sup>9</sup> *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619, 47 Sup. Ct. 688 (1927); *Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission*, 291 U. S. 587, 54 Sup. Ct. 532 (1934); *Chamber of Commerce v. Federal Trade Commission*, 13 F. (2d) 673 (C. C. A. 8th, 1926).

<sup>10</sup> *Supra* note 9; *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572 (1920); *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 43 Sup. Ct. 210 (1923); the authority given the Federal Trade Commission to determine what methods of competition a given trader employs and provisionally to determine whether such methods are unfair, subject to the right to review by the courts, does not confer on the commission judicial powers in view of the fact that the Commission's determination is not only subject to review but is enforceable only by the courts. *Nat'l Harness Mfrs. Ass'n v. Federal Trade Commission*, 268 Fed. 705 (C. C. A. 6th, 1920). In *Myers v. United States*, 272 U. S. 52, 135, 47 Sup. Ct. 21 (1926), we have dicta to the effect that where duties of a quasi-judicial character have been imposed on members of executive tribunals whose decisions affect the interests of individuals, the discharge of which the President could not in a particular case properly influence and control, still he might consider the decision after its rendition as reason for removing the officers on the ground that the discretion entrusted to them by the statute had not been intelligently or wisely exercised.

<sup>11</sup> *Buttfield v. Stranahan*, 192 U. S. 420, 24 Sup. Ct. 349 (1904); *Union Bridge Co. v. United States*, 204 U. S. 365, 27 Sup. Ct. 367 (1907). Congress in declaring the public policy and fixing the primary standard that is to control and charging the administrative body with the duty of ascertaining facts which bring into play the principles established by Congress may be deemed to invest that body with quasi-legislative powers but it will not exercise, in any true

of separation of powers help us, for we could easily, as Chief Justice Taft did,<sup>12</sup> put the shoe on the other foot and charge Congress with destroying the principle of executive responsibility.<sup>13</sup> State courts, in deciding politico-legal problems of this nature, have held that the various legislatures in the absence of express provisions in their constitutions to the contrary could condition the executive power of removal by a statute fixing the tenure of the office and precluding removal except for specific causes enumerated therein.<sup>14</sup> By distinguishing the *Myers* case the Court averted setting a dangerous precedent and safeguarded the independence of various administrative bodies set up by Congress similar to the one under discussion, but the validity and effect of statutory restrictions on the power of the President alone to remove civil officers will remain, however, a subject of doubt and discussion because the terms "character of the office" and "purely executive officers" have been left dangling in mid-air without a basic principle<sup>15</sup> to which to fasten themselves and must await further judicial consideration and determination.<sup>16</sup>

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sense, either legislative or judicial power merely because it converts the actual legislation from a static to a dynamic condition by determining some fact or state of things upon which enforcement of the enactment depends. Although the action of the Commission in issuing a cease and desist order may be considered quasi-judicial on account of *its form*, with respect to powers it is not judicial because its findings are not in the first instance embodied in a decree of a court and enforceable by execution or other writ of the Court. *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307 (C. C. A. 7th, 1919).

<sup>12</sup> *Myers v. United States*, 272 U. S. 52, 164, 47 Sup. Ct. 21 (1926). Since the executive power is authorized to enforce the laws or appoint agents charged with the duty of enforcing them and since the Commission is primarily an administrative body (*supra* note 9) we might hold that such bodies belong under the executive department under our form of government.

<sup>13</sup> U. S. CONST. Art II, §3.

<sup>14</sup> See cases enumerated by Justice Brandeis in his dissenting opinion in *Myers v. United States*, 272 U. S. 52, 249, 250, 47 Sup. Ct. 21 (1926).

<sup>15</sup> Note (1927) 27 COL. L. REV. 353. The power of Congress to stipulate the qualifications and tenure of inferior officers could rest on the "necessary and proper" clause, U. S. CONST. Art. I, §8 (18), thus conditioning the power of appointment and the power of removal; nor do we find an express grant to the President of such incidental power resembling those conferred on Congress. "The Constitution has expressly granted to Congress the legislative power to create officers and prescribe the tenure thereof." *Myers v. United States*, 272 U. S. 52, 245, 47 Sup. Ct. 21 (1926) (dissenting opinion of Justice Brandeis).

<sup>16</sup> *Marberry v. Madison*, 5 U. S. 137 (1803) set up a standard for limiting the President's power of removal to those officers appointed to aid him in the performance of his Constitutional duties. In *Ex parte Hennen*, 38 U. S. 239 (1839) the Court declared that the nature of the power of removal and of control over officers appointed did not at all depend on the source from which it emanated, but that the execution of the power depended on the authority of the law and not on the agent who was to administer it. In *Parsons v. United States*, 167 U. S. 324, 17 Sup. Ct. 880 (1896) Congressional intention and not Constitutional considerations determined the case.